

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

STATE AUTOMOBILE MUTUAL  
INSURANCE COMPANY,

*Plaintiff*

v.

FREEHOLD MANAGEMENT, INC. AND  
RETAIL PLAZAS, INC.,

*Defendants*

v.

FREEHOLD MANAGEMENT,  
INC., RETAIL PLAZAS, INC., AND  
RPI DENTON CENTER, LTD.

§ CIVIL ACTION NO. 3:16-CV-02255-L

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STATE AUTOMOBILE MUTUAL INSURANCE COMPANY'S  
AMENDED MOTION FOR SUMMARY JUDGMENT

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NOW COMES State Automobile Mutual Insurance Company ("State Auto"), in its capacity as Plaintiff/Counter Defendant in the above numbered and titled cause, and files this its Amended Motion for Summary Judgment as to the counterclaims filed and damages alleged by Defendants/Counter Plaintiffs Freehold Management, Inc., Retail Plazas, Inc., and RPI Denton Center, Ltd. ("Defendants"). As set forth more fully in the Brief in Support of this Amended Motion, and as established by the summary-judgment evidence submitted in support of this Amended Motion in the Amended Appendix submitted herewith, State Auto is entitled to summary judgment as a matter of law.

Defendants are not entitled to recover on their claims for breach of contract, breach of the duty of good faith and fair dealing, violations of Chapter 541 or 542 of the *Texas Insurance Code*, and violation of the *Texas Deceptive Trade Practices Act*. Additionally, Defendants are

not entitled to succeed on their damage model as submitted to this Court for the reason that State Auto was prejudiced by Defendants' failure to abide by the prompt notice and sworn proof of loss provisions of the insurance policy. The summary judgment evidence establishes that the damages sought were incurred outside the policy period and/or were excluded under the policy. To the extent the property damage may have been covered under the policy, Defendants have failed to segregate the covered and excluded damages as required by the concurrent causation doctrine.

The summary judgment evidence adduced and attached hereto affirmatively shows that there is no genuine issue of material fact as to any essential element of Defendants' counterclaims and damages sought. Therefore, summary judgment should be granted in favor of State Auto in its suit as a matter of law, and for any and all additional relief that State Auto may show itself justly entitled at law or in equity.

Respectfully submitted, this 30<sup>th</sup> day of August, 2018.

/s/Charles B. Mitchell Jr.

**CHARLES B. MITCHELL, JR.**

State Bar No. 14207000

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**MICHAEL SHANE O'DELL**

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**ATTORNEYS FOR PLAINTIFF,  
STATE AUTOMOBILE  
MUTUAL INSURANCE COMPANY**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing has been served on the 30<sup>th</sup> day of August, 2018, as follows via E-mail and via the Court's ECF system, which sent notification to the following:

***Via E-mail and Via E-Service***

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/s/Charles B. Mitchell, Jr.

Charles B. Mitchell, Jr.